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Public Law: Expropriation

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EXPROPRIATION

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AUTHORITY TO TAKE—NATURE OF THE INTEREST

In 1978 the Louisiana legislature made a beginning at remedying the present inequities of appropriation by providing for the payment of fair market value for such takings, rather than merely assessed value as in the past. Actual payment under the provisions, however, has been suspended until an appropriation of funds has been made by Congress, the state legislature or an appropriate levee board.[1] Nonetheless, in *Pillow v. Board of Commissioners for the Fifth Louisiana Levee District*,[2] the possibility that just compensation might at least be available prompted the filing of a suit seeking an injunction against further appropriations. The primary purpose of this class action in inverse expropriation was to achieve "pending on July 10, 1978" status for the claims arising from resolutions of appropriation already made or to be made by the levee district in concert with the United States Corps of Engineers. The prayer for injunctive and declaratory relief against planned appropriations was based on the argument that *Eldridge v. Trezevant*,[3] which upheld a levee servitude in the public from the time of severance of riparian lands from the public domain, was wrongly decided under the United States Constitution. The court rejected the plea for class action status, the only issue before it, but allowed the suit to proceed as an ordinary action in inverse expropriation. The limits of *Eldridge* were also tested in *Deltic Farm and Timber Co. v. Board of Commissioners for the Fifth Louisiana Levee District*,[4] in which the levee district sought to appropriate lands which were not riparian at the time of severance from the public domain but had become so due to course changes and erosion by the river. The owners were adjudged entitled to full compensation under expropriation principles; appropriation of land under Civil Code article 665 was limited to lands riparian at the time of severance from the public domain since only as to such lands was a levee servitude retained.

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1. LA. R.S. 38:281B (Supp. 1978). *See the Work of the Louisiana Legislature for the 1978 Regular Session—Expropriation*, 39 LA. L. REV. 205 (1978).

2. 369 So. 2d 1172 (La. App. 2d Cir. 1979).

3. 160 U.S. 452 (1896).

4. 368 So. 2d 1109 (La. App. 2d Cir. 1979).

In *State v. City of New Orleans*,[5] the city unsuccessfully sought to establish that it had been deprived of private property without compensation by the incorporation of part of the Basin Canal into the interstate system. However, the property was deemed never to have become private property since it was originally public land in the hands of the state and had been donated to the city specifically for the purpose of completing the Union Passenger Terminal facilities by the city. Thus, the property was deemed never to have left the public domain and conversion to interstate use was a mere modification in the public use thereof and not an expropriation.

DAMAGES

The First Circuit Court of Appeal in *Marathon Pipe Line Co. v. Pitcher*[6] affirmed an award for the value of a servitude taken and for severance damages resulting from the presence of a petroleum pipeline. In lieu of awarding the cost of encasing the pipeline under a future access road should the tract be developed as a subdivision, the trial court imposed an obligation, running to the owner and successors in title, requiring the expropriator to encase the pipeline should the street be constructed. This portion of the judgment was affirmed by the court of appeal. Upon review,[7] however, the Louisiana Supreme Court found that the court-imposed obligation was not compensation made by "a price in money," as required by Louisiana law.[8] The court suggested that, even as a setoff against damage, the arrangement might not be permissible since a 1974 provision precludes setoff of benefits against the value of property taken and specifically requires that "the owner shall be compensated to the full extent of his loss."[9] Such an interpretation, that special benefits can no longer be setoff against severance damages, if applied to takings on behalf of the public, could prove costly indeed to the public fisc. In a dissenting opinion, Justice Tate pointed out that this provision, taken from the 1974 constitution,[10] could hardly be deemed to require payment "for losses *which have not occurred and which may never occur.*"[11] He reasoned that the trial court's obligation imposed sensible and adequate protection for the owner in lieu of *denying* speculative severance damages and was

5. 360 So. 2d 624 (La. App. 4th Cir. 1978).

6. 361 So. 2d 314 (La. App. 1st Cir. 1978).

7. 368 So. 2d 994 (La. 1979).

8. *Id.* at 998, *citing* LA. CONST. of 1921, art. I, § 2; LA. CIV. CODE arts. 497 & 2633-34; Louisiana Power & Light Co. v. Lasseigne, 256 La. 919, 240 So. 2d 707 (1970).

9. LA. R.S. 19:9 (1950 & Supp. 1974).

10. LA. CONST. art. I, § 4.

11. 368 So. 2d at 999 (Tate, J., dissenting) (emphasis in original).

well within the sound discretion of the trial court; nonetheless, the supreme court rejected this middle ground and awarded compensation for what apparently is only potential damage.

State v. Lutcher & Moore Cypress Lumber Co.[12] involved the taking of swamp land for interstate construction. The trial court made a sweeping finding that some 23,000 acres had suffered a dimunition of ten percent in value. The Fourth Circuit Court of Appeal modified this award by giving credence to evidence that existing access to major portions of the swamp land was left undisturbed by the interest taken. A "lump-sum judgment factor," without sales data, was deemed to be inadequate supporting evidence for the massive severance damages awarded by the trial court.

In another loss-of-access case, *Boothe v. Department of Public Works*,[13] manifest error by a trial court also resulted in excessive severance damages. The owner argued that the expropriation by the state prevented access to a "ford," the right to which had been acquired by prescription; the argument, accepted by the trial court, was overturned on appeal on the basis that such a servitude was discontinuous in nature[14] and could be acquired only by title.[15] Furthermore, the "ford" had not become part of a public road since it had never been maintained or worked by parish authorities.[16]

VALUATION

In *State v. McInnis*,[17] the Third Circuit Court of Appeal allowed an owner of land appraised as commercial to recover substantially in excess of salvage value for residential improvements thereon. The court accomplished this anomalous result by finding that the improvements were an enhancement to the value of the property "for some types of commercial purposes."[18] The court utilized a "formula" applied in similar circumstances in *State v. Goldberg*[19] to reduce replacement value of the residence by thirty percent. A less arbitrary procedure might have been to allow enhancement of commercial value to the extent of the capitalized value, at a relatively high capitalization rate, of the short-term income potential of the im-

12. 364 So. 2d 134 (La. App. 4th Cir. 1978).
13. 370 So. 2d 1282 (La. App. 3d Cir. 1979).
14. LA. CIV. CODE art. 727.
15. LA. CIV. CODE art. 766 (as it appeared prior to 1977 La. Acts, No. 514). (current version at LA. CIV. CODE art. 739).
16. LA. R.S. 48:491 (1950 & Supp. 1954).
17. 360 So. 2d 887 (La. App. 3d Cir. 1978).
18. *Id.* at 890.
19. 223 So. 2d 174 (La. App. 3d Cir. 1969).

provement.[20] In his dissent, Judge Cutrer could find no contributory value in the improvements, noting that the fact that the owner "paid for them and should be reimbursed" was hardly compliance with the appraisal requirement noted in *Goldberg*, *i.e.*, "[c]onsideration of the value of . . . buildings and improvements is limited to the extent only that they enhance the value of the land."[21]

As has been noted, the new constitution significantly expanded the concept of compensation by adding to the expropriation provision the requirement that "the owner shall be compensated to the full extent of his loss . . . ."[22] The Louisiana Supreme Court announced in *State v. Constant*[23] that, in view of this addition, "it is not constitutionally significant that the award . . . will exceed the market value of the property used in . . . business operations."[24]

PROCEDURE

In *Hodges v. LaSalle Parish Police Jury*,[25] a tenant seeking damages for expropriation of leased property was deemed not to have alleged a "compensable legal status running with the land"[26] in pleading that he had the "use" and "possession" of property. However, the trial court committed error in not affording the tenant an opportunity to amend his pleadings so as to state a cause of action as tenant.[27] A trial court also committed error in *Wright v. State*[28] by awarding damages for contempt of a court injunction in which, before the injunction against appropriation of air space could become executory, the state amended its petition to expropriate the air space for a bridge over a previously dedicated street, thus curing the contempt.

Compensation was denied in *Brooks v. New Orleans Public Ser-*

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20. *See* M. DAKIN & M. KLEIN, EMINENT DOMAIN IN LOUISIANA 236 (1970) & 87 (Supp. 1978).

21. 223 So. 2d at 177, *quoting* 4 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 13.11 (3d ed. 1950).

22. LA. CONST. art. I, § 4.

23. 369 So. 2d 699 (La. 1979).

24. *Id.* at 702. A student note appearing in this issue of the Review examines in detail the reasoning and holding in the case and concludes that the court has not here made an award of compensation which could not have been justified under the jurisprudence prior to the adoption of the language of the new constitution. *See* Note, ***Expropriation: Compensating the Landowner to the Full Extent of His Loss***, 40 LA. L. REV. 817 (1980).

25. 368 So. 2d 1117 (La. App. 3d Cir. 1979).

26. *Id.* at 1118.

27. *See* LA. CODE CIV. P. art. 934.

28. 359 So. 2d 635 (La. App. 1st Cir. 1978).

vice[29] for an unauthorized taking under the *St. Julien* doctrine.[30] The property, over which an unauthorized servitude was alleged, had been acquired by the present owner subject to the servitude and with no express assignment of any right to compensation. The right in such circumstances has been held to be personal to the owner at the time of the taking and hence actionable by a later owner only if expressly transferred to him.[31]

In *State v. Bougere*,[32] a court of appeal took occasion to note again that while determination of expert fees is generally within the discretion of the trial court, the denial of fees for preparatory work was arbitrary where the results of such work were evident in the record. The court also found no justification for denial of a fee to an expert for services rendered on a report which was the basis for a stipulation used at the trial and therefore useful to the court. In 1974 the state legislature provided discretionary authority to the courts for award of an attorney's fee not in excess of twenty-five percent of the difference between the award and the amount deposited by the state in the registry of the court.[33] In *State v. Frabbiele*,[34] the court had occasion to note that the statute provides for an award and sets a limit thereon; it does not, however, eliminate the need for adducing evidence as to the reasonableness of a fee award. A judgment allowing a full twenty-five percent, despite the absence of any testimony of effort expended or time involved, was therefore remanded to the trial court for the purpose of taking such testimony and assessing a fee based thereon.

BURDEN OF PROOF—EVIDENCE

While damages resulting from inconvenience or discomfort are normally not compensable, recovery has been allowed to the extent such damages decrease the market value of the owner's remaining property. However, as with severance damages generally, if the expropriator contends there has been no effect on market value, the owner has the burden of proof to establish such damage by

29. 370 So. 2d 686 (La. App. 4th Cir. 1979).

30. St. Julien v. Morgan La. & Tex. R.R., 35 La. Ann. 924 (1883).

31. Gumbel v. New Orleans Terminal Co., 197 La. 439, 1 So. 2d 686 (1941). *Lake, Inc. v. Louisiana Power & Light Co.*, 330 So. 2d 914 (La. 1976), holding a transmission line to be a discontinuous servitude not within the *St. Julien* doctrine, and the subsequent legislative partial overruling of the *Lake* case, *see* LA. R.S. 19:14 (Supp. 1976), had no effect since the instant servitude was taken prior to such judicial and legislative action. 370 So. 2d at 688-89.

32. 363 So. 2d 228 (La. App. 4th Cir. 1978).

33. LA. R.S. 48:453 (Supp. 1954 & 1974).

34. 372 So. 2d 234 (La. App. 4th Cir. 1979).

evidence. In *State v. Johnson*,[35] the third circuit based its award for inconvenience on the subjective opinion of the owner that he had suffered an aesthetic and convenience loss in addition to the severance damages awarded for a decrease in value of the premises after the taking. Citing *State v. Champagne*,[36] the court held that, even within the broadened language of the 1974 constitution, an owner is not entitled to recover for what "he subjectively believes to be his loss."[37]

Traditionally, the trial court is vested with great discretion in setting an award within the limits of the evidence adduced for the record. It is not generally bound by the testimony of the experts except that such testimony will set the upper and lower limits of an award.[38] Thus, in *Louisiana Gas Purchasing Corp. v. Sincox*,[39] the Second Circuit Court of Appeal found no error on the part of the trial court in making an award which was not in "the exact amount established by the testimony of the experts."[40] The same court seemingly contradicted the foregoing by announcing in *State v. Dance*[41] that "[a] trial court may not substitute its opinion for that of the experts who testified at the trial."[42] However, the court's holding goes no further than to correct the trial court in exceeding the limits of severance damage testified to by any expert. Similarly, in *State v. Eubanks*,[43] upon which the second circuit relied in making its announcement, the third circuit corrected a trial court in awarding severance damages in excess of the highest amount "[a]ccording to the testimony of the experts."[44] Perhaps a more precise statement would be that "a trial court may not substitute its opinion for that of the experts who testified at the trial *as to the upper and lower limits of an award.*"

35. 369 So. 2d 191 (La. App. 3d Cir. 1979). *See also* State v. Olivier, 365 So. 2d 1164 (La. App. 3d Cir. 1978).

36. 356 So. 2d 1136 (La. App. 3d Cir. 1978).

37. 369 So. 2d at 194, *quoting* State v. Champagne, 356 So. 2d at 1140.

38. *See* M. DAKIN & M. KLEIN, *supra* note 20, at 398-99 (1970) & 128-29 (Supp. 1978).

39. 368 So. 2d 816 (La. App. 2d Cir. 1979).

40. *Id.* at 817.

41. 367 So. 2d 155 (La. App. 2d Cir. 1979).

42. *Id.* at 157.

43. 345 So. 2d 533 (La. App. 3d Cir. 1977).

44. *Id.* at 537.